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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GIGANEWS, INC., a Texas corporation;
LIVEWIRE SERVICES, INC., a Nevada
corporation,

Plaintiffs,

V.

PERFECT 10, INC., a California corporation, NORMAN ZADA, an individual, and DOES 1-50, inclusive

Defendants.

| Case No.: 2:17-cv-05075-AB (JPR)

Before Honorable André Birotte, Jr.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' RULE 12(B)(6)
MOTION TO DISMISS**

[Request to Take Judicial Notice Filed Separately Herewith]

Date: October 20, 2017
Time: 10:00 a.m.
Courtroom: 7B, 350 West First Street,
Los Angeles, CA 90012

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that at 10:00 a.m. on October 20, 2017, at 10
3 a.m. or as soon thereafter as this matter may be heard, in Courtroom 7B of the
4 United States District Court for the Central District of California, located at 350
5 West First Street, Los Angeles, CA 90012, Defendants Perfect 10, Inc. and Norman
6 Zada will move to dismiss the Complaint against them pursuant to Federal Rule of
7 Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted,
8 for two separate reasons. First, the facts alleged in the Complaint cannot plausibly
9 support a fraudulent transfer claim given the judicially-recognizable fact that
10 Defendants made an offer to satisfy the judgment in full, thereby creating a plausible
11 alternative explanation of Defendants' conduct that is not illegal. *See, e.g., Bell*
12 *Atlantic Corp. v. Twombly*, (2007) 550 U.S. 544, 556-557 (2007); *Ashcroft v. Iqbal*,
13 556 U.S. 662, 682 (2009). Second, the fraudulent transfer claims are precluded
14 under the doctrine of collateral estoppel by this Court's previous order (and the
15 Ninth Circuit's affirmance of that order) denying Plaintiffs' motion to affix liability
16 to Defendant Norman Zada on the grounds of alter ego in the related case, *Perfect*
17 *10, Inc. v. Giganews*, 2:11-cv-07098-AB.

18 This Motion is based upon this Notice of Motion, the accompanying
19 Memorandum of Points and Authorities, the Request for Judicial Notice, on the
20 papers and records on file herein, and on such oral and documentary evidence as
21 may be presented at the time of the hearing.

22 This Motion is made following the conference of counsel pursuant to L.R. 7-3
23 which took place on August 16, 2017 and August 24, 2017.

24 DATED: September 5, 2017

LAW OFFICES OF MATTHEW C. MICKELSON

25 By: /s/ Matthew C. Mickelson

26 MATTHEW C. MICKELSON

27 Attorney for Defendants Perfect 10, Inc.
and NORMAN ZADA

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Plaintiffs in this case ask the Court to believe the incredible. Their Complaint
 3 weaves a sinister story of fraud, alleging that Defendants Dr. Norman Zada and
 4 Perfect 10, Inc. are guilty of the illegal transfer of assets to avoid payment of the fee
 5 judgment Plaintiffs hold against Perfect 10. Their evidence? \$1.75 million in cash
 6 transfers from Perfect 10 to Dr. Zada which took place before judgment was entered,
 7 plus the movement of a piddling amount of goods (primarily a six-year-old Lexus
 8 and some old magazine copies) to Dr. Zada (and for which Dr. Zada paid \$70,000,
 9 more than a fair sum). Plaintiffs loudly proclaim that these facts show that
 10 Defendants held the fraudulent intent to deprive Plaintiffs of the \$1.75 million that
 11 was transferred.

12 Plaintiffs leave one gigantic fact completely out of their Complaint, however.
 13 As this Court well knows – because Defendants' offer to pay in full was previously
 14 brought to the Court's attention – **Defendants offered to pay Plaintiffs \$2 million**
15 dollars, plus a first trust deed of \$3.829 million on Dr. Zada's home, only 10
16 days after judgment was rendered. The total sum offered was more than the
17 judgment, by almost \$200,000. But Plaintiffs turned down the offer.

18 It takes a lot of gall for Plaintiffs to charge that Defendants have fraudulently
 19 transferred assets, while failing to mention that the entire sum, and more, of the
 20 transferred monies was laid out in front of them, offered on a silver platter, and they
 21 turned it down. But here we are.

22 A complaint must have some semblance of plausibility to survive a motion to
 23 dismiss under the standard set out by the Supreme Court in *Ashcroft v. Iqbal*, 556
 24 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Here,
 25 there is no such plausibility at all. To put it most simply, *a debtor holding the*
26 fraudulent intent to transfer assets does not offer the creditor more than the assets
27 transferred only days after a judgment is rendered. The two propositions are
 28 completely irreconcilable. Given the facts judicially noticeable in the record (the

offer was entered into evidence by Plaintiffs in various filings before both this Court and the Ninth Circuit), the Complaint's allegations make no sense at all. They are implausible, impossible actually, and must be dismissed.

And if that is not enough, this Court, in adjudicating a motion to amend the judgment to add Norm Zada as a judgment debtor (affirmed by the Ninth Circuit), ruled that Perfect 10 was not "undercapitalized to pay its reasonably foreseeable debts," and that "[t]here is no evidence [Dr. Zada] 'stripped' Perfect 10 of its assets." It also found that Plaintiffs here "failed to demonstrate that Perfect 10 currently has insufficient assets to satisfy the judgment were it to sell some or all of its intellectual property." In affirming this Court's ruling, the Ninth Circuit went further. After reviewing most of the allegedly unlawful transfers detailed in the Complaint, including both the first transfer made on January 3, 2014, and the last transfer made on November 20, 2014, the Ninth Circuit held that none of those transfers constituted evidence that Perfect 10 was stripped of its assets and that "there is no evidence of bad faith." These rulings serve as collateral estoppel, and negate any inference that Dr. Zada made any transfer with the requisite bad faith needed to incur liability under either fraudulent transfer statute.

It is beyond the scope of this Motion to explain why Plaintiffs have filed a lawsuit which is completely implausible under the known facts, especially when those relevant facts are completely ignored in their Complaint. A certain level of vindictiveness may be inferred. In any event, this Court should not allow this seemingly endless litigation to be perpetuated under the vehicle of this particular lawsuit in light of the judicially-noticeable fact that Defendants offered to pay the judgment in full and the prior findings of no evidence of stripping of assets or bad faith made by this Court and the Ninth Circuit. Defendants' motion to dismiss should be granted.

Plaintiffs appear to have no respect for the Court's limited resources, as they have filed their complaint before either a) determining if Perfect 10's copyrights and

1 trademarks could be sold for an amount to satisfy the judgement, b) waiting for the
 2 Supreme Court to decide the case, or c) waiting for Perfect 10's case against AOL
 3 Germany to be decided, any one of which could render Plaintiff's complaint moot.

4 **II. STATEMENT OF FACTS**

5 On November 26, 2014, final judgment was entered against Perfect 10 in
 6 *Perfect 10, Inc. v. Giganews, Inc.* United States District Court for the Central
 7 District of California Case No. 2:11-cv-07098-AB-JPR (the "Related Action.")
 8 (Complaint at ¶ 17.) On March 24, 2015, this Court granted Plaintiffs' Motion for
 9 Attorney's Fees and Expenses in the amount of \$5,637,352.53 (*Id.* at ¶ 18.)

10 On April 4, 2015, Perfect 10 offered to pay the entirety of the judgment
 11 against it, along with almost \$200,000 extra for Plaintiffs' post-judgment attorney's
 12 fees, as follows: a \$2 million cash payment to be made immediately, along with a
 13 trust lien in favor of Plaintiffs on the home of Dr. Zada in the amount of
 14 \$3,829,352.40 (with the lien to be released should Perfect 10 be successful in its
 15 appeal.) Plaintiffs rejected this offer and refused to make a counter-offer. (*See*
 16 Request to Take Judicial Notice, filed separately herewith ("RJN"), Exh. 1 [Exhibit
 17 to the Declaration of Andrew P. Bridges, setting forth Perfect 10's offer] and
 18 Exh. 3 [pages 1-2 of Reply Brief of Defendants-Appellees Giganews, Inc. and
 19 Livewire Services, Inc. in Support of Cross-Appeal, setting forth the offer, with
 20 highlighting added for the convenience of the Court].)

21 On April 21, 2015, Plaintiffs filed a motion seeking to add Dr. Zada to the
 22 judgment on the grounds that he was the alter ego of Perfect 10. (Case No. 2:11-cv-
 23 07098-AB-JPR Dkt. 703.) In support of their alter ego motion, Plaintiffs submitted
 24 to the Court a financial statement that Perfect 10 had produced to Plaintiffs, which
 25 showed transfers made by Perfect 10 up through March 31, 2014 (*See* RJN, Exh. 2
 26 [Exhibit 2 to the Reply Declaration of Todd R. Gregorian, at p. 514, highlighting in
 27 original].) That financial statement shows three of the transfers that Plaintiffs now
 28 allege are fraudulent in the Complaint in this action – the payments to Dr. Zada on

1 January 3, March 10, and March 19, 2014, totaling \$350,000. (See Complaint, ¶ 19.)

2 On June 3, 2015, after considering and reviewing substantial evidence
 3 presented by both sides, this Court denied Plaintiffs' alter ego motion. (See RJN,
 4 Exh. 6, Dkt. 734]). This Court determined that Perfect 10 was not "undercapitalized
 5 to pay its reasonably foreseeable debts" and that "[t]here is no evidence [Dr. Zada]
 6 'stripped' Perfect 10 of its assets." (*Id.* at p. 7.) The Court also held that Plaintiffs
 7 here "failed to demonstrate that Perfect 10 currently has insufficient assets to satisfy
 8 the judgment were it to sell some or all of its intellectual property." (*Id.* at p. 7.)

9 After Perfect 10 appealed, Plaintiffs filed a cross-appeal of this Court's Order
 10 denying the alter ego motion. In connection with that cross-appeal, Plaintiffs filed a
 11 Request for Judicial Notice. In that request, Plaintiffs filed a transcript of a debtor
 12 examination of Dr. Zada taken on January 28, 2016, excerpts of which are attached
 13 as RJN, Exh. 4 [highlighting in original]). During that examination, Dr. Zada
 14 confirmed that Perfect 10 had transferred \$850,000 to him on November 20, 2014
 15 (*id.* at 150:15-151:14), and \$100,000 on October 7, 2014. (*Id.* at 155:3-5.) Dr. Zada
 16 testified in that same debtor examination that he was "entitled to that money" (*id.* at
 17 151:9-10), because of Dr. Zada's capital contributions of over \$53 million to Perfect
 18 10 (*id.* at 151:24-25). *See also* RJN, Exh. 6, at p. 7, n.3 (This Court notes that Dr.
 19 Zada has drawn down his capital contributions to Perfect 10 over the last several
 20 years).

21 On January 23, 2017, the Ninth Circuit rendered its decision affirming this
 22 Court's judgments and orders made in the Related Case in all respects. (RJN Exh.
 23 5.) With regard to Plaintiffs' cross-appeal regarding the alter-ego motion, the Ninth
 24 Circuit determined that "there is no evidence of bad faith" in any of the conduct
 25 complained about in Plaintiffs' alter ego motion or supplemental request for judicial
 26 notice. (RJN Exh. 5, p. 38.) The Ninth Circuit went on to conclude that "this is not
 27 a case where a sole shareholder operated a company with little or no assets, nor is
 28 this a case where a company was stripped of its assets to shield its sole shareholder

1 from adverse judgments.” (RJN Exh. 5, p. 38.) Finally, although the Ninth Circuit
 2 declined to judicially notice the documents Plaintiffs filed with it, nonetheless it
 3 found that “even if we were to grant Appellees’ request, those transcripts would not
 4 alter our conclusion that the district court did not clearly err.” (*Id.*)¹

5 **III. ARGUMENT**

6 Plaintiffs have filed a Complaint which makes allegations that are
 7 implausible in light of undisputed judicially-noticeable evidence, and barred by the
 8 doctrine of collateral estoppel, based on rulings by this Court and the Ninth Circuit.
 9 For those reasons, the complaint must be dismissed without leave to amend.

10 **A. Legal Standard On Motions To Dismiss Under Rule 12(b)(6) of the** **11 Federal Rules of Civil Procedure**

12 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil
 13 Procedure is similar to the common law general demurrer—i.e., it tests the *legal*
 14 *sufficiency* of the claim or claims stated in the complaint. (*Strom v. United States*,
 15 641 F.3d 1051, 1067 (9th Cir. 2011).) In ruling on such a motion to dismiss, the
 16 Court may take consider judicially-noticeable matters. (*See Coto Settlement v.*
 17 *Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) [“On a motion to dismiss, we may
 18 consider materials incorporated into the complaint or matters of public record”];
 19 *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1024 n. 9 (9th Cir. 2012)
 20 [“Although, as a general rule, a district court may not consider materials beyond the
 21 pleadings in ruling on a Rule 12(b)(6) motion, one exception to this general rule is
 22 that a ‘court may take judicial notice of matters of public record without converting

23

24 1 This decision, of course, negates Plaintiffs’ boilerplate allegations in the
 25 Complaint that Defendants are “alter egos” of each other. (Complaint, at ¶11).
 26 Moreover, it is not true, as alleged in the Complaint, that Perfect 10 has not
 27 voluntarily paid any monies pursuant to the judgment (Complaint at ¶¶ 4, 28); the
 28 latest report of the Receiver shows that Defendants have cooperated and that various
 sums have been collected from Perfect 10 by the Receiver (Related Case Docket No.
 825, at 2:16-17, 4:5.)

1 a motion to dismiss into a motion for summary judgment, as long as the facts noticed
 2 are not subject to reasonable dispute.””].)

3 **B. Plaintiffs’ Claims Under The Uniform Fraudulent Transfer Act**
 4 **Should Be Dismissed Because They Are Implausible Given The**
 5 **Judicially-Noticeable Facts In the Record.**

6 **1. Claims of Illegal Conduct That Are Contradicted by Facts**
 7 **Showing A Legal Reason For That Conduct Will Not,**
 8 **Without More, Survive A Motion to Dismiss.**

9 “To survive a motion to dismiss, a complaint must contain sufficient factual
 10 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’””

11 (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) [quoting *Bell Atlantic v. Twombly*, 550
 12 U.S. 544, 570 (2007)]). While the Court must accept as true all of the well-pleaded
 13 allegations of the complaint, this rule “is inapplicable to legal conclusions.” (*Id.*)
 14 Thus, a complaint that merely offers “‘naked assertions[s]’ devoid of ‘further factual
 15 enhancement’” is insufficient to survive a motion to dismiss. (*Id.*) (quoting
 16 *Twombly*, 550 U.S. at 557). Likewise, “[t]hreadbare recitals of the elements of a
 17 cause of action, supported by mere conclusory statements” are insufficient. (*Id.*)
 18 The “plausibility standard … asks for more than the sheer possibility that a
 19 defendant acted unlawfully.” (*Id.*) Where “the well-pleaded facts do not permit the
 20 court to infer more than the mere possibility of misconduct,” the complaint fails to
 21 satisfy the requirements of Fed. R. Civ. P. 8(a)(2) and should be dismissed. (*Id.* at
 22 679.)

23 Most importantly, for purposes of this case, if all that a plaintiff has alleged
 24 are facts consistent with illegal behavior, but there is an “obvious” and legal
 25 alternative explanation for the conduct, the facts alleged by plaintiff will not
 26 “plausibly establish” the improper purpose. (*See Ashcroft v. Iqbal, supra*, 556 U.S. at
 27 682 [allegation that plaintiff’s arrest was result of unlawful discrimination against
 28 Muslim men was not “plausible” *in view of more likely explanation* for arrest
 (detention of illegal aliens who had potential connections to those who committed

1 terrorist acts); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009)
 2 [“An inference pressed by the plaintiff is not plausible if the facts he points to are
 3 precisely the result one would expect from lawful conduct in which the defendant is
 4 known to have engaged.”].)

5 This issue was explored at length by the Ninth Circuit in *In re Century*
 6 *Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013):

7 When faced with two possible explanations, only one of which can be
 8 true and only one of which results in liability, plaintiffs cannot offer
 9 allegations that are “merely consistent with” their favored explanation
 10 but are also consistent with the alternative explanation. *Iqbal*, 556 U.S.
 11 at 678, 129 S.Ct. 1937 (internal quotation marks omitted). Something
 12 more is needed, such as facts tending to exclude the possibility that the
 13 alternative explanation is true, *see Twombly*, 550 U.S. at 554, 127 S.Ct.
 14 1955, in order to render plaintiffs' allegations plausible within the
 15 meaning of *Iqbal* and *Twombly*. Here, plaintiffs' allegations remain
 16 stuck in “neutral territory,” *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955,
 because they do not tend to exclude the possibility that their shares
 came from the pool of previously issued shares [non-illegal conduct].

17 This holding is consistent with our opinion in *Starr v. Baca*, 652 F.3d
 18 1202 (9th Cir. 2011), where there were two *plausible* explanations in
 19 contention. *Id.* at 1216. “If there are two alternative explanations, one
 20 advanced by defendant and the other advanced by plaintiff, *both of*
 21 *which are plausible*, plaintiff's complaint survives a motion to dismiss
 22 under Rule 12(b)(6).” *Id.* (emphasis added). Here, however, plaintiffs'
 23 explanation is merely *possible* rather than plausible. To render their
 24 explanation plausible, plaintiffs must do more than allege facts that are
 merely consistent with both their explanation and defendants'
 competing explanation.

25 *Id.* at 1108 (emphasis in original); *see also Gonzalez v. Planned Parenthood of L.A.*,
 26 759 F.3d 1112, 1116 (9th Cir. 2014) (affirming dismissal where plaintiff's allegation
 27 that defendant knowingly submitted false claims was only “merely possible rather
 28 than plausible,” and could not overcome the plausible and obvious explanation that

1 defendant did not knowingly submit false claims); *Eclectic Props. E., LLC v.*
 2 *Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (explaining that courts
 3 “must consider” “obvious alternative explanation[s]” for a defendant’s behavior
 4 when analyzing plausibility).

5 Overall, the Ninth Circuit has developed a two-step process to determine the
 6 plausibility of a complaint’s allegations and whether it can survive a motion to
 7 dismiss:

8 First, to be entitled to the presumption of truth, allegations in a
 9 complaint or counterclaim may not simply recite the elements of a
 10 cause of action, but must contain sufficient allegations of underlying
 11 facts to give fair notice and to enable the opposing party to defend itself
 12 effectively. Second, the factual allegations that are taken as true must
 13 plausibly suggest an entitlement to relief, such that it is not unfair to
 14 require the opposing party to be subjected to the expense of discovery
 15 and continued litigation. . . . In all cases, evaluating a complaint’s
 16 plausibility is a “context-specific” endeavor that requires courts to
 17 ‘draw on . . . judicial experience and common sense.’”

18 *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (quotations and citations
 19 omitted).

20 **2. Defendants’ Offer, Made Days After the Fee Judgment, to
 21 Pay Plaintiffs More Cash Than Was Transferred to Dr.
 22 Zada, Eviscerates Plaintiffs’ Claims of Actual Fraudulent
 23 Intent.**

24 The Complaint alleges two causes of action: The first for violation of the
 25 Uniform Voidable Transactions Act (the “UVTA”), alleging actual fraudulent
 26 transfer, and the second for violation of the UVTA, alleging constructive fraud.²

27 With regard to the first cause of action, a plaintiff must prove that a debtor
 28 made the transfer (or incurred the obligation) with “*actual intent* to hinder, delay, or
 defraud *any* creditor of the debtor.” (Cal. Civil Code § 3439.04(a)(1) (emphasis

28 ² The Complaint refers to the previous name of the statute, the Uniform Fraudulent Transfer Act.

added).) In addition, the plaintiff must also affirmatively show that he or she has been *injured* by the voidable transfer. The alleged voidable transfer must put beyond the creditor's reach property that could satisfy the debt. (*Mehrtash v. Mehrtash*, 93 Cal.App.4th 75, 80 (2001) [“Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively”]; *Fidelity Nat'l Title Ins. Co. v. Schroeder* 179 Cal.App.4th 834, 841, 844 (2009).)

Here, the Complaint cannot plausibly make a case for violation of the UVTA, because the judicially-noticeable record is clear that Defendants offered to pay the fee judgment in full only days after it was rendered. On April 4, 2015, eleven days after the \$5.637 million attorney's fees award was entered on March 24, 2015, Perfect 10 offered to pay Plaintiffs \$5.829 million, \$192,000 more than the award. Plaintiffs rejected this offer and refused to make a counter-offer. (RJN, Exh. 1, Exh. 3 at pp. 1-2. The fact that \$2 million in cash (along with the \$3.826 million trust deed) was offered to the Plaintiffs after the judgment was issued in and of itself also negates Plaintiff's damage claim, since they cannot complain of alleged damages of \$1.75 million when they were provided with the means to secure not just \$2 million in cash, but the full amount. Finally, the fact that Dr. Zada and Perfect 10 did not have the funds to pay the full amount in cash is no basis to allege fraud. Dr. Zada and Perfect 10 did the best they could do given the limited amount of cash they had available.³

a. **Of the Two Explanations For The Transfers, Only The Innocent One Is Plausible And Supported By Facts**

Plaintiffs' explanation for the \$1,750,000 in transfers made from Perfect 10 to

³ There are businesses that purchase first trust deeds for only a minor discount to their face value. What Perfect 10 and Dr. Zada effectively offered, was \$2 million in cash immediately, plus payment in full should Perfect 10 lose its appeal.

1 Dr. Zada, beginning on January 3, 2014⁴, and ending on November 20, 2014, before
 2 the fee judgement was entered, is that they were made deliberately, in anticipation of
 3 unfavorable rulings, to avoid paying those monies to Plaintiffs. (Complaint at ¶¶
 4 19, 28, 36.)

5 The existence of the offer by Defendants to pay \$2 million in cash to Plaintiffs
 6 as part of a full price offer makes the above explanation implausible in the extreme.

7 Plaintiffs' Complaint asks the Court to believe two irreconcilable propositions
 8 – that Perfect 10 and Dr. Zada possessed the *fraudulent intent* to hinder, delay or
 9 defraud Plaintiffs from recovering their fee judgement by transferring \$1,750,000 in
 10 funds prior to entry of judgement, **and yet those same Defendants offered to pay**
 11 **\$250,000 more than that sum in cash, along with a trust deed on Dr. Zada's**
 12 **house valued at \$3.829 million, only days after the judgment was entered.**

13 These two propositions simply do not jibe. A debtor who possesses the
 14 mental state to fraudulently transfer assets would, at a minimum, make sure to *keep*
 15 those funds out of the creditor's reach, *not offer them up on a silver platter as soon*
 16 **as a judgment was entered.**

17 The alternative, innocent, legal, and plausible explanation for the transfers,
 18 which also has the virtue of being supported by the known facts – is that Dr. Zada
 19 was taking funds from Perfect 10 in partial payback of the more than \$53 million in
 20 capital contributions he had made to the company. (RJN, Exh. 4, at 151:24-25.)
 21 Such transfers cannot be voidable as against Dr. Zada, the transferee, since they
 22 were taken in good faith and for a reasonably equivalent value. (Cal. Civil Code §
 23 3439.08(a) (*see* Section III.B.3, below.)

24 The fact that the transfers were made in the ordinary course and without any
 25 fraudulent intent is also shown by the fact that Perfect 10 held significant funds in its

27 ⁴ The beginning date of January 3, 2014 appears to be completely arbitrary.
 28 No facts are provided to support Plaintiff's allegation that the supposed fraud began
 on that date.

1 accounts even after various transfers, regularly holding onto more than \$1,000,000
 2 in net assets and equity and possessing in excess of \$2 million of such as late as
 3 March, 2014. (See RJD, Exh. 6, at p. 7.) Indeed, from 2006 through 2013, Perfect
 4 10 maintained an average balance at the end of the year in all Perfect 10 bank
 5 accounts of \$422,611.05. (RJD, Exh. 2, pp. 275, 302, 328, 352, 376 412, 444, 475.)
 6 Plaintiffs do not explain why Dr. Zada would maintain several times Perfect 10's
 7 historical bank balance for most of 2014 (particularly in an ultra-low interest rate
 8 environment), if he expected an adverse attorney's fee award (Complaint at ¶¶28,
 9 36), or intended to defraud Plaintiffs.

10 The plausibility of the innocent explanation is even more convincing, given
 11 that no alleged infringer in a copyright case had ever been awarded fees of any
 12 significance unless either a) the alleged infringer was found to actually own the
 13 works in dispute, or b) established a fair use defense. (RJD Exh. 7, Dkt. 650-3, Case
 14 2:11-cv-07098-AB-SH.)⁵ Neither was the case here. Perfect 10 and Dr. Zada
 15 therefore had a reasonable and good faith belief that there would no creditors against
 16 which these transfers would prejudice. There is no support whatsoever for
 17 Plaintiff's contention that Dr. Zada anticipated a fee award against Perfect 10, which
 18 is not only pure conjecture, but defies logic and commons sense. Plaintiffs provide
 19 no plausible explanation as to why Perfect 10 would continue litigating a case it
 20 expected to lose, or reject Plaintiff's 2014 settlement offer. Nor do Plaintiffs point
 21 to a single prior victory by a Usenet operator to support their contention that Perfect
 22 10 believed it would lose (Complaint ¶¶ 28, 36), because there are none. Finally,

23
 24 ⁵ For example, in two of the three cases involving awards over \$1,000,000, the
 25 defendant was found to own the copyrights in dispute. *See, Mattel, Inc. v. MGA*
26 Entertainment, Inc., 2011 WL 3420603 (C.D. Cal. Aug 04, 2011) and *Fantasy, Inc.*
27 v. Fogerty, 94 F.3d 553 (9th Cir. 1996). In the third case, the defendant established
 28 a fair use defense, and the plaintiff against whom the \$1,826,000 fee award was
 levied was Mattel, Inc. a multi-billion dollar company, who could easily pay the
 award. *Mattel, Inc. v. Walking Mountain Prods.*, 2004 WL 1454100 at *4 (C.D.Cal.
 June 21, 2004)

1 Plaintiffs cannot identify a single prior instance where a court found Perfect 10's
 2 complaint to be meritless, or awarded fees against Perfect 10.

3 **b. No Usenet Case Had Been Won by the Usenet Operator**

4 Plaintiffs cannot site a single Usenet case where the Usenet provider won,
 5 because none did, prior to this case.

6 The following Usenet cases were lost by the Usenet operator on summary
 7 judgment: *Arista Records LLC v. Usenet.com, Inc.*, 633 F.Supp.2d 124 (S.D.N.Y.
 8 2009); *Perfect 10, Inc. v. GUBA, LLC*, 2002 WL 34940074 (N.D. Cal. Dec. 30,
 9 2002); and *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 968 F.Supp. 1171 (N.D.
 10 Tex. 1997). In *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir.
 11 2001), the case was remanded back to the district court for further proceedings and
 12 was ultimately settled. *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004),
 13 involved AOL, a company whose Usenet operation represented less than .25% of its
 14 business. That case was remanded back to the district court for further proceedings
 15 and was also ultimately settled.

16 **3. Defendants' Offer Days After the Judgment to Pay Plaintiffs
 17 More Cash Than Was Previously Transferred Negates
 18 Plaintiffs Claims of Constructive Fraudulent Intent.**

19 Regarding the Second Cause of Action, a plaintiff must prove that the
 20 defendant made the transfer (or incurred the obligation) *without* receiving
 21 “*reasonably equivalent value*” in exchange (¶ 3:325) *and* the debtor intended to
 22 incur or believed (or reasonably should have believed) that the debtor would *incur*
 23

24

25

26

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28

debts beyond the debtor's ability to repay (Cal. Civ. Code § 3439.04(a)(2)(B)).⁶

As an initial matter, no facts are alleged in the Complaint to substantiate these required elements. But even if there were, the \$2 million cash offer and \$3.829 million trust deed from Defendants negates the required mental states in their entirety. Defendants could not possibly have possessed the mental belief at the time of the transfers that no money would be available to pay debts that would have been covered by those transfers, where Defendants offered almost immediately to pay even more than the amount of those transfers to Plaintiffs.⁷

The bottom line is that the Court is faced with two explanations for the transfer of funds from Perfect 10 to Dr. Zada from early to late 2014. The innocent explanation is simple – Dr. Zada had the right to receive those funds as a partial drawdown of his enormous capital contributions to Perfect 10, and he had no inkling that such transfers would work to the derogation of any creditors since a fee award of the kind and scope eventually entered was unprecedented in previous court cases. Plaintiffs' sinister view of the facts is that Perfect 10 transferred the money to Dr. Zada to frustrate Plaintiffs' yet-to-exist judgment – *even though Defendants offered to pay them every penny of the transferred funds, and more, only days after the*

⁶ The constructive fraud provisions of the UVTA contain two other situations in which transfers will be deemed voidable, but Plaintiffs in their Complaint only allege that Defendants have committed a voidable transfer pursuant to Civil Code section 3439.04(a)(2)(B), the “intended to incur, or reasonably believed that debtor would incur, debts beyond debtor’s ability to pay as they became due” section of the statute. (Complaint, ¶ 35-36.)

⁷ The lack of an intent to denude Perfect 10 of assets is also shown by Plaintiffs' own evidence – Dr. Zada's testimony during his judgment debtor examination, submitted to the Ninth Circuit, in which he indicated that \$500,000 to \$550,000 of the \$850,000 transferred was put back into Perfect 10's account in 2015. (RJN, Exh. 4, at 151:13-14.)

1 *judgment was entered.⁸*

2 Plaintiffs' story is fundamentally at odds with judicially-noticeable facts. The
 3 only plausible explanation of the facts here is the innocent one. Accordingly, the
 4 Motion to dismiss should be granted.

5 **C. Plaintiffs' Claims Are Barred Under the Doctrine of Collateral
 6 Estoppel**

7 In a diversity case, such as this one, the collateral estoppel rules of the forum
 8 state are employed. (*Pardo v. Olsen & Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir.
 9 1994).) In California, the doctrine of collateral estoppel precludes relitigation of
 10 issues argued and decided in prior proceedings. (*Lucido v. Superior Court*, 51
 11 Cal.3d 335, 341 (2009).) The doctrine applies if: (a) the issue sought to be
 12 precluded is identical to the one in the former proceeding, (b) the issue was actually
 13 litigated in the former proceeding, (c) the issue was necessarily decided in the
 14 former proceeding, and (d) the decision in the former proceeding was final and on
 15 the merits. (*Id.*) In addition, the party against whom preclusion is sought must be the
 16 same as, or in privity with, the party to the former proceeding. (*Id.*) The "identical
 17 issue" element merely addresses whether "identical factual allegations" are at stake,
 18 not whether the ultimate issues or dispositions are the same. (*Bostick v. Flex Equip.
 19 Co, Inc.*, 147 Cal.App.4th 80, 96 (2007).)

20 Here, both claims are barred by the doctrine of collateral estoppel.

21 **1. Doctrine of Collateral Estoppel Bars Relitigation of Actual
 22 Fraudulent Intent**

23 ⁸ The fact that \$2,000,000 in cash was offered, \$250,000 more than was
 24 transferred (along with a \$3.829 million trust deed), also disposes of Plaintiffs'
 25 complaints that various small items of personal property were fraudulently
 26 transferred to Dr. Zada. (See Complaint, ¶ 21.) Plaintiffs provide no explanation as
 27 to why the \$70,000 that Dr. Zada paid Perfect 10 for a six-year-old Lexus, t-shirts,
 28 magazines and a few desks and computers, was not a fair price (RJN, Exh. 4, at
 88:15-91:21, 110:5-24), let alone why such items could possibly be worth more than
 the \$250,000 in extra cash offered to settle the case.

With regard to the Civil Code section 3439.04(a)(1) claim, the doctrine bars the relitigation of fraudulent intent. (*See Lewis v. Superior Court*, 30 Cal.App.4th 1850, 1859 (1994) [“‘Fraudulent intent,’ ‘collusion,’ ‘active participation,’ ‘fraudulent scheme’—this is the language of *deliberate wrongful conduct*. It belies any notion that one can become a fraudulent transferee by accident, or even negligently”].)

As noted above, the Ninth Circuit, after reviewing the majority of the transfers alleged in Plaintiffs’ Complaint, including both the first alleged fraudulent transfer on January 3, 2014, and the last alleged fraudulent transfer on November 20, 2014, determined that “there is no evidence of bad faith.” RJD Exh. 5, p. 38. The Ninth Circuit went on to conclude that “this is not a case where a sole shareholder operated a company with little or no assets, nor is this a case where a company was stripped of its assets to shield its sole shareholder from adverse judgments.” (*Id.*)

In other words, the Ninth Circuit has already found that the complained of transfers were not done with fraudulent intent. Plaintiffs are thus precluded from relitigating those issues.

2. Doctrine of Collateral Estoppel Bars Relitigation of Issue that Defendants Believed Perfect 10 Would Incur Debts Beyond Its Ability to Pay

Under section 3439.04(2)(B), Plaintiffs must prove that Perfect 10 believed it would incur debts beyond its ability to pay as they became due. But this Court previously ruled that Perfect 10 was not “undercapitalized to pay its reasonably foreseeable debts,” and that “[t]here is no evidence [Zada] ‘stripped’ Perfect 10 of its assets.” RJD Exh. 6, p. 7 It also found that Plaintiffs here “failed to demonstrate that Perfect 10 currently has insufficient assets to satisfy the judgment were it to sell some or all of its intellectual property.” (*Id.* at p. 7.) These findings were affirmed by the Ninth Circuit. RJD Exh. 5, p 38.

These judicial findings are fundamentally at odds with any allegation that

1 Defendants “intended to incur, or believed or reasonably should have believed that
2 the debtor would incur, debts beyond the debtor’s ability to pay as they became
3 due.” Accordingly, Plaintiffs’ constructive fraudulent transfer claim is also barred
4 by the doctrine of collateral estoppel.

5 **IV. CONCLUSION**

6 Plaintiffs have filed their complaint only because they refused to accept
7 Defendant’s full price offer and then lost their alter ego motion. After refusing
8 Defendant’s full price offer, Plaintiffs have no legitimate basis to allege fraud. For
9 all of the foregoing reasons, Defendants respectfully requests that the Court grant
10 their motion to dismiss in its entirety without leave to amend.

11 DATED: September 5, 2017

12 LAW OFFICES OF MATTHEW C. MICKELSON

13 By: /s/ Matthew C. Mickelson

14 MATTHEW C. MICKELSON

15 Attorney for Defendants Perfect 10, Inc.
16 and NORMAN ZADA